
(2013) 11 RAJ CK 0015
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 1893 of 2013

Union of India

APPELLANT

Vs

Giriraj Civil Developers Private Ltd.

RESPONDENT

Date of Decision : 09-11-2013

Acts Referred:

Citation : AIR 2014 Raj 15 : (2014) 3 RLW 2368

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Bela M. Trivedi, J.—With the consent of the learned counsels for the parties, the appeal is decided finally at the admission stage. The present appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") is directed against the order dated 2-5-2013 passed by the Additional District Judge No. 6, Jaipur Metropolitan, Jaipur (hereinafter referred to as "the Court below") in application No. 334/2012, whereby the Court below has allowed the application of the respondent No. 1 applicant filed u/s 9 of the said Act and restrained the appellants from encashing the bank guarantee dated 6-4-2011 as also the fixed deposit dated 13-9-2010, till the period of one month after the appointment of Arbitrator.

2. The short facts giving rise to the present appeal are that the respondent No. 1 was awarded a contract pursuant to the tender No. NWR/S and C/JP-Sikar-LHU & Sikar-Cur/GC/T/1RR dated 11-2-2011. It appears that in respect of the said contract, an agreement was entered into between the parties on 16-8-2011, however before signing of the agreement, the respondent No. 1 had to furnish the performance guarantee in the form of bank guarantee and also the fixed deposit. Accordingly, the respondent No. 1 had furnished the fixed deposit for Rs. 13,19,300/- on 13-9-2010 and performance guarantee in the form of bank guarantee to the tune of Rs. 1,07,06,100/- on 6-4-2011 (hereinafter referred to as "the bank guarantee in question"). It further appears that the certain disputes

arose between the parties with regard to the execution of the contract in question. According to the appellants, the respondent No. 1 had failed to carry out the terms and conditions of the contract, as a result of which the appellants had rescinded the contract vide the letter dated 14/15-2-2012, after giving notice of 48 hours on 4-5-2012 to the respondent No. 1. It further appears that the said action of the appellants was challenged by the respondent No. 1 by filing the writ petition being No. 8395/2012 before this Court. This Court vide the order dated 30-5-2012 disposed of the said writ petition, along with one another writ petition being No. 7828/2012, by directing that the bank guarantee shall not be encashed till 16-7-2012. It further appears that the respondent No. 1, thereafter filed the application u/s 9 of the said Act before the Court below seeking interim measures in respect of the bank guarantee and the fixed deposit furnished by it. The Court below vide the ad-interim order dated 16-7-2012 had restrained the appellants from encashing the fixed deposit as well as the bank guarantee in question, till the final disposal of the application u/s 9 of the said Act. The Court below, thereafter, vide the impugned order dated 2-5-2013 allowed the said application of the respondent No. 1 filed u/s 9 of the said Act, confirming the earlier order passed on 16-7-2012 and further restrained the appellants from encashing the fixed deposit as well as the bank guarantee in question, till the period of one month after the appointment of the Arbitrator. Being aggrieved by the said order, the appellants have filed the present appeal.

3. It has been sought to be submitted by the learned counsel Mr. P.C. Sharma, for the appellants that the respondent No. 1 had committed breach of terms and conditions of the contract and had not performed his part of contract, and therefore, the contract was terminated after giving it the requisite notice as per the agreement. He also submitted that the appellants are entitled to encash the performance guarantee as the respondent No. 1 had committed default of the terms and conditions of the contract, however before the bank guarantee in question could be invoked, the respondent No. 1 had obtained the stay against encashment of the bank guarantee, initially from the High Court, and thereafter, from the Court below, and therefore, the appellants have not been able to encash the same. Placing heavy reliance on the decision of the Apex Court in case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, he submitted that the appellants could not be restrained from encashing the bank guarantee in absence of allegations of fraud or irretrievable injury made by the respondent No. 1.

4. However, the learned counsel Dr. P.C. Jain, for the respondent No. 1 vehemently submitted that the appeal of the appellants was not tenable in the eye of law, inasmuch as the same was not filed by the authorized person, nor the learned counsel Mr. P.C. Sharma was duly authorized to appear on behalf of the appellants. He also submitted that the appellants had not removed the office objections and had also not paid the requisite court-fees for filing of the present appeal. Taking the Court to the pleadings i.e. the application u/s 9 of the said Act, Dr. Jain submitted that the appellants had committed fraud with the

respondent No. 1 by not providing the drawings and also the requisite material to enable the respondent No. 1 to proceed further with the execution of the work and that the contract was terminated by the appellants though there was no fault on the part of the respondent No. 1. According to him an irretrievable injury would be caused to the respondent No. 1 if the bank guarantee is permitted to be encashed. Dr. Jain, further submitted that the Officer of the appellants was apprehended pursuant to the complaint filed by the respondent No. 1 before the C.B.I., and as a counter blast thereof, the appellants had terminated the contract and were bent upon to encash the bank guarantee. He also submitted that the respondent No. 1 has already filed the application for appointment of the Arbitrator before the High Court, and therefore, till the said appointment is made, the appellants be restrained from encashing the bank guarantee. Nobody appears for the respondent No. 2, though duly served.

5. Apropos, the preliminary objections raised by the learned counsel Dr. P.C. Jain for the respondent No. 1, it may be stated that the present appeal has been filed by the Deputy Chief Engineer (C), Northern Western Railway, Jaipur, through the learned counsel Mr. P.C. Sharma, who has also filed the authority letter duly signed by the Deputy Chief Engineer (C). There is nothing on record to suggest that the Deputy Chief Engineer had no authority to present the present appeal or that Mr. P.C. Sharma, was not authorized to appear as an Advocate for the appellants. As regards the office objection for the payment of court-fees, it may be stated that the appellants had already made the payment of requisite court-fees, however with some delay, which was condoned by the Court vide the order dated 22-10-2013. The Court, therefore, does not find any substance in the preliminary objections raised by the learned counsel for the respondent No. 1.

6. Before advertng to the rival contentions on merits, raised by the learned counsels for the parties, it would be appropriate to consider the settled legal position as regards the encashment of the bank guarantee, as propounded by the Apex Court from time to time in various pronouncements, in case of AIR 1997 1644 (SC) and in case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., In a recent decision in case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, the Apex Court after considering earlier decisions has laid down the principles in the matter of injunction with regard to encashing the bank guarantee and letter of credit in para 14, which reads as under :--

14. From the discussion made hereinabove, relating to the principles for grant or refusal to grant of injunction to restrain enforcement of bank guarantee or a letter of credit, we find that following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :--

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee or a

Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantee or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

7. From the aforesaid legal position, it is clear that the beneficiary of the bank guarantee or the letter of credit is entitled to realize such bank guarantee or the letter of credit in terms thereof, irrespective of any pending disputes relating to the terms of the contract, and that the bank giving such guarantee is bound to honour the same irrespective of any dispute raised by its customer. It is also settled by the Apex Court that the Courts should be slow in granting the order of injunction to restrain the realization of the bank guarantee or letter of credit. Such bank guarantee or letter of credit is an independent and separate contract which is absolute in nature, the existence of any dispute between the parties to the contract would not be a ground to restrain enforcement of bank guarantee. Further, an order of injunction for restraining the enforcement of the bank guarantee should not be granted unless the party prima facie establishes the fraud of an egregious nature, or the irretrievable harm or injustice.

8. So far as the facts of the present case are concerned, it is not disputed that the dispute between the parties had arisen with regard to the performance of the contract in question, and the said contract was terminated by the appellants after giving requisite notice to the respondent No. 1. It is also not disputed that the application for the appointment of Arbitrator for resolving the said disputes is pending before this Court. Though, the learned counsel Dr. Jain, for the respondent No. 1 had tried to submit from the application made by the respondent No. 1 u/s 9 of the said Act that irretrievable injury would be caused to the respondent No. 1, if the bank guarantee is permitted to be encashed, the Court does not find any substance in the said submission. There is nothing whatsoever, averred or alleged in the said application that any fraud of an egregious nature was committed by the appellants while obtaining the bank

guarantee in question or that any irretrievable harm or injustice would be caused to the respondent No. 1, except that the respondent No. 1 had alleged that it will suffer financial loss. Under the circumstances, the learned counsel Dr. P.C. Jain, for the respondent No. 1 has failed to prima facie establish either the commission of fraud or the irretrievable injury as contemplated by the Apex Court in the case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , and the other earlier decisions. The Court, therefore, finds substance in the submissions made by the learned counsel for the appellants that the Court below has committed an error in passing the impugned order in utter disregard of the legal position settled by the Apex Court, and therefore, the impugned order deserves to be set aside. In view of the above, the appeal deserves to be allowed. The impugned order dated 2-5-2013 passed by the Court below is set aside. It is clarified that the appellants shall be at liberty to invoke the bank guarantee dated 6-4-2011 as per its terms. The appeal stands allowed accordingly.